IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 44 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

ANILABEN UPENDRA SHAH

Appearance:

1. INCOME TAX REFERENCE No. 44 of 1988
MR AKIL KURESHI with MR MANISH R BHATT for Petitioner
NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 17/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue,

the following question is referred for our opinion in respect of assessment year 1983-84 :-

"Whether in law and on facts when the assessee received possession of the flat in October, 1981 and sold the same on 4.12.1982, the assessee is entitled to benefit of sec. 80T of the I.T. Act, 1961 ?"

2. The facts leading to this reference, briefly stated, are as under :-

The assessee is an individual and the assessment year involved in 1983-84. She filed the return of her income on 23.6.1983 showing total income at Rs.39,756/-. During the course of examination of the record of the assessee, it was noticed by the Income-tax Officer that she had taken possession of a flat in October, 1981 and the said flat was sold in December, 1982 for Rs.1,40,000/- including outstanding loan of Rs.30,000/-. The Income-tax officer further noted that in her return of income, the assessee had claimed the capital gain as a long term capital gain and had accordingly claimed deduction under Section 80T of the Act for an amount of Rs.14,310/-. The Income-tax Officer was of the opinion that the capital gain should be treated as short term capital gain in view of the date of taking possession of the flat in October, 1981 and the sale thereof by her in December, 1982. ON being asked to explain, the assessee through her reply dated 14.9.1984 contended that she had become a member of Ambalal Park Co-operative Housing Society Ltd. on 6.9.1979 by depositing a sum of Rs. 5000/- which included entrance fees of Rs. 55/- and share capital of Rs.250/-. The assessee further contended that she had become member of the society by acquiring shares thereon on 15.11.1979. It was further explained by the assessee that the total cost of the flat after excluding the loan amounting to Rs.30,000/- came to Rs.67,757/-. The possession of the said flat was, however, delivered by the said society to the assessee only in October, 1981. Thereafter, the assessee had entered into an agreement to sell the said flat on 8.10.1982 and in performance of such contract she had later on sold the same on 4.12.1982 for Rs.1,40,000/-. It was, thus contended on behalf of the assessee that it was not at all a case of short term capital gain, but was that of long term capital gain. The Income-tax Officer did not feel satisfied with the contentions of the assessee. In this opinion, the assessee had avoided to mention the date of transfer of the shares, though the assessee had contended that the contract was completed

when allotment of shares was made. The Income-tax Officer was, therefore, of the opinion that since the assessee had taken possession in October, 1981 and the date of possession was material for the purposes of effective ownership, it was a case of short term capital gain and should be taxed accordingly. The Income-tax Officer, therefore, subjected an amount of Rs.42,243/- to the short term capital gain tax. The aggrieved assessee appealed to the Appellate Assistant Commissioner.

Before the Appellate Assistant Commissioner, the main contention of the assessee was that she had acquired the capital asset on 7.9.1979 and in no case later than 15.11.1979 and, therefore, she was entitled to deduction under Section 80T to the extent of Rs.16.434/-. It was further contended on behalf of the assessee that the words "held" and "possessed" were not synonymous. Both the words were having different meanings. According to the assessee, the word used by the legislature was "held" and, therefore, "possession" was not relevant for computing the period of capital asset held. Relying upon certain decisions of the Tribunal, the Appellate Assistant Commissioner accepted the contention of the assessee and following the view of the Tribunal to the effect that the date of acquisition of flat was the date of agreement and not the date of occupation of the flat, directed the Income-tax Officer to treat the capital gain as long term capital gain and grant deduction under Section 80T of the Act to the assessee. The revenue carried the matter in appeal to the Tribunal.

The Tribunal confirmed the view of the Appellate Assistant commissioner. Hence, this reference at the instance of the revenue.

3. We have heard Mr Akil Kureshi, learned counsel for the revenue. Though served, none appears for the respondent-assessee.

4. Mr Kureshi has vehemently submitted that all that the assessee acquired on 15.11.1979 was the shares in the Co-operative Housing Society, but she acquired possession of the flat only in October, 1981, presumably because the construction of the flat was not completed till then. It is, therefore, the contention of Mr Kureshi that the assessee did not acquire, and could not have acquired, the flat which was not in existence on 15.11.1979. Since the flat was constructed and acquired within three years prior to the date of transfer in December, 1982, the capital asset in question was a short term capital asset meaning thereby it was held for less than 36 months.

5. For the relevant assessment year 1983-84, clause (iii) of Section 27 of the Act read as under :-

"(iii) a member of a co-operative society to whom a building or part thereof is allotted or leased under a house building scheme of the society shall be deemed to be the owner of that building or part thereof."

With effect from 1.4.1988, the following clause (iiia) was added :-

"(iiia) a person who is allowed to take or retain possession of any building or part thereof in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), shall be deemed to be the owner of that building or part thereof."

6. A perusal of clause (iii) of Section 27 makes it clear that the legislature has not made any reference to handing over possession because the possession is never considered to be a sine qua non of ownership which consists of a bundle of rights. Moreover, the amendment by the legislature by insertion of clause (iiia) with effect from 1.4.1988 also indicates that the legislature was conscious of the fact that prior to 1.4.1988 taking or retaining possession of any building in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act was not considered as ownership for the purpose of the Income-tax Act. Hence, the assessee not getting possession of the flat in question at the time of allotment on 15.11.1979 did not detract from the assessee's ownership of the property in question even if it was constructed after 15.11.1979.

7. We also had an occasion to consider a similar question under the provisions of the Wealth-tax Act. By Section 5(1)(xxviii), the shares in a Co-operative Housing Society are exempted from the wealth-tax liability. The assessee, in that case upon holding shares in a Co-operative Housing Society was allotted a open plot of land, was sought to be subjected to wealth-tax liability. The Tribunal had accepted the case of the revenue that it was an asset which was includible in the net wealth of the assessee and at the instance of the assessee a reference was made to this Court being Wealth Tax Reference No. 29 of 1987. The Court

considered the question whether the Tribunal was justified in including the value of the assessee's interest in the open plots in question in two co-operative societies in the net wealth of the assessee. In the course of hearing of that Wealth Tax reference, the learned counsel for the revenue had contended that what was exempted under Section 5(1)(xxviii) of the Wealth-tax Act was only the shares in the co-operative society and not the lease hold interest in open plot of the land belonging to the co-operative housing society. This Court dealt with that argument in the following paragraph :-

"As regards the contention of the learned counsel for the revenue that what is exempted under Section 5(1)(xxviii) is only the shares in the co-operative housing society and not the leasehold interest in open plot of land belonging to the co-operative housing society, the argument is incomprehensible. It is only by virtue of his being a member of the co-operative housing society on the strength of holding shares in the society that the member is allotted any plot of land or any building. In response to a query from the Court whether a member can sell all his shares in a cooperative housing society and still retain any interest in any property whether land or building belonging to a co-operative housing society and allotted/let out to the member or whether any member can transfer all the rights to possession, usufruct and other rights relating to the property without selling the shares held by him, the learned counsel for the revenue submitted that the shares as well as interest in the land or building are two separate properties and the legislature has granted exemption under Section 5(1)(xxviii) only qua shares in a co-operative housing society and not qua interest in the land or building, we are unable to accept this contention because the learned counsel has not been able to point out any provision of either the Gujarat Cooperative Societies Act or the Rules framed thereunder or the bye-laws of the Co-operative Society which contemplate interest in the property belonging to a co-operative housing society being permitted to be held by a person without holding its shares. We, therefore, proceed on the basis that when the legislature granted exemption under Section 5(1)(xxviii) of the Act in respect of shares in a

co-operative housing society, the legislature intended to grant exemption in favour of all the rights flowing from shares in a co-operative housing society except the interest, which the legislature itself brought in within the tax net by making an express provision in sub-section (7) of Section 4 of the Act."

8. It is thus clear that the member of a co-operative housing society only owns the shares in that society. The right to enjoy, or derive from, any land or building belonging to the co-operative housing society is merely an incidental right flowing from the ownership of the shares. A member of a co-operative housing society cannot sell all his shares in a co-operative housing society and still retain any interest in any property, whether land or building, belonging to a co-operative housing society and allotted/let out to the member. Similarly, a member of a co-operative housing society to whom a flat or land is allotted cannot transfer such land or building without selling the shares held by him. Hence, when the question comes up for consideration as to which is the relevant date, while computing the capital gain tax in case of transfer of his shares by a person who is a member in a co-operative housing society, the relevant date would be the date on which the member acquires the shares in the co-operative housing society and the date on which the member had sold his shares in the said co-operative housing society.

In the facts of the instance case, it is clear that the assessee acquired shares in the co-operative housing society and allotted the flat on 15.11.1979 and she transferred those shares on 4.12.1982. Thus, the assessee had held the shares and allotment of the flat in the said co-operative housing society for a period of more than 36 months. Accordingly, the capital gain in question was rightly held by the Tribunal to be a long term capital gain. Therefore, the assessee was rightly entitled to the benefit of Section 80T of the Income-tax Act, 1961.

9. In view of the above discussion, we answer the question referred to us in the affirmative i.e. in favour of the assessee and against the revenue.

10. The reference accordingly stands disposed of with no order as to costs.

(M.S. Shah, J.)

(D.A. Mehta, J.)

sundar/-